

25-33
No. 11937

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O. ENGLAND, Trustee of the Estate of
Burlingame Products Co., Inc., Bankrupt,
Appellant,

vs.

F. W. MacKAY,

Appellee.


Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUL -2 1948

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of the United States for the
Northern District of California, Southern
Division

No. 36674 R In Bankruptcy

In the Matter of

BURLINGAME PRODUCTS CO., INC.,
Bankrupt.

ORDER OF
ADJUDICATION AND REFERENCE, ETC.

At San Francisco, in said District, on the 24th
day of February, 1947.

The Petition of E. G. Stephens, doing business as Western Steel & Wire Co., Alfredo De Nola, doing business as Universal Container Co. and San Francisco Wire & Iron Works, a copartnership, filed on the 22nd day of January, 1947, that Burlingame Products Co., Inc., be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Burlingame Products Co., Inc., is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Burlingame Products Co., Inc., shall hence-

forth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in Burlingame "Advance-Star", a newspaper published in the County of San Mateo, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated February 24, 1947.

MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed Feb. 24, 1947. [1*]

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At a Court of Bankruptcy, held in and for the Northern District of California, Southern Division, at San Francisco, the 17th day of April, 1947, before Burton J. Wyman, Referee in Bankruptcy in the Southern Division of the United States District Court for the Northern District of California.

It appearing to the Court that John O. England of the City and County of San Francisco, in said

*Page numbering appearing at foot of page of original certified Transcript of Record.

District, has been duly appointed Trustee of the estate of the bankrupt above-named, and has given a bond with sureties for the faithful performance of his duties, in the amount fixed by the Court, to-wit: in the sum of Four Thousand (\$4,000.00) Dollars.

It Is Ordered that the said bond be, and the same is hereby approved.

Dated, this 22nd day of April, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

I hereby certify that the foregoing is a full, true and correct copy of the original on file in my office.

Dated 2/22/47.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 25, 1947. [2]

[Title of District Court and Cause.]

PETITION FOR
ORDER TO SHOW CAUSE

To the Honorable Burton J. Wyman, Referee in Bankruptcy of the above-entitled Court at San Francisco, in said District:

The petition of John O. England, Trustee in Bankruptcy of the estate of Burlingame Products

Co., Inc., a corporation, bankrupt, respectfully shows:

1. That on the 24th day of February, 1947, by the consideration of the United States District Court for the Northern District of California, said Burlingame Products Co., Inc., a corporation, was duly adjudged bankrupt upon a petition filed against it whereupon administration of said estate was duly referred to Burton J. Wyman, Esq., Referee in Bankruptcy, before whom such proceedings were had as that thereafter, to wit, on the 17th day of April, 1947, your petitioner was duly appointed Trustee of the bankrupt's estate [3] and effects, thereupon qualifying as such, and your petitioner has ever since has been and now is the duly qualified and acting trustee of said estate in bankruptcy.

2. That your petitioner has heretofore caused to be examined in this proceeding under Section 21-A of the Bankruptcy Act, J. Mauborgne, President of said bankrupt corporation, A. A. MacNeil, Secretary-Treasurer thereof, and F. W. MacKay; that from such examination and the testimony of said witnesses, it appears, and your petitioner so alleges the fact to be, that the bankrupt corporation was organized in March, 1946; that no permit to issue shares of capital stock has ever been obtained from the Corporation Commissioner of the State of California and that no shares of capital stock have ever been issued to any of the officers or directors of said corporation, or to anyone else; that said corporation

was organized at the instigation of said F. W. MacKay for his personal benefit and that the said F. W. MacKay and said corporation were and are in reality the same, and that said F. W. MacKay, with disregard of the substance or form of corporate management, has treated its affairs as his own and as a part of his own enterprise.

3. That the assets of this bankrupt estate are insufficient to satisfy the claims of creditors which have been filed in this proceeding.

4. That it is the contention of your petitioner that the said bankrupt corporation and the said F. W. MacKay are one and the same; that by reason thereof the said F. W. MacKay is responsible as an individual for the payment of the debts contracted in the name of the bankrupt corporation, and that his assets should be marshaled by this Court for the purpose of realizing therefrom sufficient moneys, with the moneys now in your petitioner's hands, to satisfy all of the claims of creditors filed herein.

Wherefore, your petitioner prays that an Order to show [4] cause be issued upon the said F. W. MacKay to appear and show cause, if any there be, why an Order should not be made and entered requiring said F. W. MacKay to turn over to your petitioner all of his assets, or to pay to your petitioner a sum of money sufficient, with the moneys now in your petitioner's hands as Trustee of this estate, to satisfy proper expenses of administration

herein and all of the creditors' claims filed in this proceeding.

JOHN O. ENGLAND,
Trustee in Bankruptcy.

JAMES M. CONNERS,

STANLEY M. McLEOD,
Attorneys for Trustee.

State of California,
City and County of San Francisco—ss.

John O. England, being duly sworn, does hereby make solemn oath and says:

That he has read the foregoing petition and that the same is true to the best of his knowledge and belief.

JOHN O. ENGLAND.

Subscribed and sworn to before me this 29th day of July, 1947.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 30, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [5]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the petition of the Trustee in the above-entitled proceeding, wherein the Trustee prays for an Order requiring F. W. MacKay to turn over to said Trustee all of his assets or to pay to said Trustee a sum of money sufficient, with the moneys now in said Trustee's hands, to satisfy all proper expenses of administration herein and all of the creditors' claims filed in this proceeding.

Now, upon motion of James M. Conners and Stanley M. McLeod, attorneys for the Trustee,

It Is Hereby Ordered that the said F. W. MacKay be, and he is hereby required to appear before the undersigned, Burton J. Wyman, Esq., Referee in Bankruptcy, at the courtroom of said Referee, Room 609, 1095 Market Street, San Francisco, California, [6] on the 8th day of September, 1947, at 2 o'clock in the afternoon, to show cause, if any he has, why such Order should not be granted.

It Is Further Ordered that service of a copy of the Trustee's Petition and this Order on the said F. W. MacKay on or before August 15th, 1947, shall be sufficient notice of the hearing of this Order.

Dated: July 30, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed July 30, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [7]

[Title of District Court and Cause.]

RESPONSE TO ORDER
TO SHOW CAUSE BY F. W. MacKAY

Now comes F. W. MacKay, by his attorney undersigned, in response to the Order to Show Cause issued in the above-entitled proceeding of date July 30th, 1947, and respectfully represents and shows:

I.

That the petition for said Order to Show Cause does not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever.

II.

By way of factual showing under the said Order, but without waiver of the foregoing objection to the competence of said petition, respondent attaches hereto his affidavit and refers to the same and makes it a part hereof.

Wherefore respondent prays that the said Order to Show Cause be discharged and dismissed forthwith.

Dated, San Francisco September 8, 1947.

NATHAN MORAN,

Attorney for F. W. MacKay.

Overruled, 9/8/47 in open court, B.J.W.

[Title of District Court and Cause.]

AFFIDAVIT IN RESPONSE
TO ORDER TO SHOW CAUSE

State of California,

City and County of San Francisco—ss.

F. W. MacKay being first duly sworn deposes and says:

That he is an American citizen, of the age of 53 years or thereabouts, and by profession a geologist and mining operator. That approximately sixteen years ago he retired from professional and general business activities and since that time has devoted himself to travel and the pursuit of outdoor recreation.

That affiant has no dependents nor any living near relatives. That he has from sources outside the State of California an income sufficient to supply his wants and that he has no motive nor incentive, nor any desire nor inclination to amass properties, to increase his income, nor to re-enter business activities of any kind, but that from time to time he has become acquainted with worthy individuals who were struggling to advance themselves under difficulties and has advanced them financial aid but

with no motive of profit to himself except to recover the amount of [9] such advances and possibly interest thereon at current commercial rates.

That during the war period affiant became acquainted in San Francisco with one Joseph O. Mauborgne Jr., through a common interest in breeds of dogs, and formed for him liking and regard; that said Mauborgne is in the business of running a pet shop and had knowledge of a small bird-cage manufacturing business operated by an individual who wanted to retire, and that he, Mauborgne, wished to acquire and operate the same as a side line to his store, more especially as there was a war shortage of the product, and to him affiant advanced the money required to purchase the machinery and equipment used in said business. Said transaction was made under an agreement between affiant and said Mauborgne that the latter should devote all necessary time in mechanical and managerial services to the operation of the said business, without salary or compensation other than that the profits thereof would be divided share and share alike between himself and affiant. That said purpose was made, and Mauborgne took over the equipment and operation of the said business accordingly, and continued the same in the said City of San Francisco under the trade name of Western Products Company. That bird-cages were and are important to said Mauborgne but of no interest or consequence to affiant.

That during the early part of the year 1946 affiant decided to return for an indefinite period to

the Island of Tahiti in the South Pacific, where he had resided and had interests previously to his coming by reason of the war to San Francisco, and he thereupon consulted an attorney with respect to his local business affairs, and was by the latter advised that the business last referred to did not have proper legal standing inasmuch as the fictitious name thereof had never been registered as required by law.

That upon consultation between affiant and said Mauborgne it was mutually agreed that they would form a corporation to take [10] over and operate the said business, on the basis that the profits and emoluments thereof of whatever the same might consist would be divided share and share alike between the two, and in pursuance of said agreement a corporation was formed, under the name Burlingame Products Company, which took over the assets and operation of the preceding business, and inasmuch as its facilities in San Francisco were inadequate moved the same to the City of Burlingame, County of San Mateo, California, in the course of which affiant made further cash advances to the said corporation, of which Mauborgne had become president and manager and who thereafter gave to it his full time and services and the use of his automobile without salary or compensation other than his agreed prospective one-half share in the profits and any issue of corporate stock which might result. That the said Mauborgne also from time to time made contributions in cash for

the benefit of the said corporation, the amount of which affiant does not at present recollect.

That affiant did not become a director or officer of the said corporation, and shortly after its formation departed for the Island of Tahiti, where he remained until in or about the month of September 1946 when he returned to San Francisco and found that the said corporation was in a state of insolvency.

That at the first meeting of the board of directors of said corporation its attorney was requested and instructed to make application to the Corporation Commissioner of the State of California for the issuance of corporate stock, in such amounts as in his opinion were justified by the financial condition of the company; that affiant is informed by said attorney and believes and therefore alleges that in the interim last mentioned no application was filed with the said Corporation Commissioner for the issuance of stock, for the reason that the removal of the corporate business from San Francisco and its reestablishment in Burlingame [11] involved numerous complications and distractions on the part of the company's officers and that the financial and other statements required by law and regulations for a proper application to the Corporation Commissioner could not be obtained.

That in addition to the instance hereinabove cited, on three other occasions this affiant has made financial advances to individuals whom he considered personally worthy, in order that they might individually better their condition in the community,

on an agreed basis of sharing in profits and emoluments, two of which were in the ratio of equal shares and the other at a somewhat different percentage.

Affiant expressly denies that the said corporation, Burlingame Products Company, was organized at his instigation or for his personal benefit or otherwise than as hereinabove alleged, and further denies that affiant and said corporation were and are or were or are in reality the same or otherwise than as hereinabove alleged—that affiant was to receive 50% of the profits and emoluments thereof; and further denies that affiant disregarded the substance or form, or either of them, of corporate management, and has treated its affairs as his own and as a part of his own enterprise, or any or either of them. Affiant further denies that the bankrupt corporation and he are one and the same or otherwise than as hereinabove alleged, and further denies that by any reason at all affiant is responsible as an individual for the payment of the debts contracted in the name of said bankrupt corporation and that his assets should be marshaled by this Court for the purpose of realizing therefrom sufficient monies or any monies to satisfy all or any of the claims of creditors filed in this proceeding; and denies generally and specifically that affiant is responsible as an individual or otherwise for the payment of any debts contracted in the name of said bankrupt corporation, or otherwise or at all.

F. W. MacKAY. [12]

State of California,
City and County of San Francisco—ss.

F. W. MacKay being first duly sworn deposes and says:

That he has read the foregoing Affidavit in Response to Order to Show Cause and that the same is true of his own knowledge except as to those matters alleged on information or belief, and that as to those matters he believes it to be true.

F. W. MacKAY.

Subscribed and Sworn to before me this 8th day of September, 1947.

Original Signed By

[Seal] NELL O'DAY,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 26, 1948.

[Endorsed]: Filed Sept. 8, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [13]

[Title of District Court and Cause.]

ORDER ON PETITION THAT F. W. MacKAY
TURN OVER ASSETS

This matter came before the court on September 8, 1947, on the petition of John O. England that

F. W. MacKay turn over to said petitioner, as the trustee of the estate of the above-named bankrupt, all of said MacKay's assets, or a sum of money sufficient (when added to the proceeds of the bankrupt estate) to satisfy all legal expenses of administration herein and all of the creditors' claims filed in this proceeding, upon the order to show cause based on said petition; upon the response and affidavit of said MacKay, and (in accordance with a stipulation on the part of interested counsel) upon the evidence theretofore given in the above-entitled proceeding in bankruptcy, and the matter having been submitted for decision on briefs and the briefs having been filed and considered [14] by the court, in connection with the aforesaid evidence, the court, now being advised fully in the premises, finds that:

1. On February 24, 1947, Burlingame Products Co., Inc., a corporation, duly was adjudged a bankrupt by the above-entitled court, and the above-entitled matter duly referred to the undersigned referee in bankruptcy for further proceedings; on April 17, 1947, John O. England duly was appointed trustee of the bankrupt's estate and thereupon qualified as such trustee, and at the times of the filing of the aforesaid petition against F. W. MacKay, and all times since said last mentioned filing of said petition, has been, and now is, the duly appointed, qualified and acting trustee in bankruptcy herein;

2. In March, 1946, the above-named bankrupt became, ever since has been, and now is, a corpo-

ration organized and existing under the laws of the State of California, and, neither at the time it first became such corporation, nor at any time since, has any permit to issue shares of capital stock thereof ever been issued to the officers and/or directors of said corporation, or to any one else;

3. The corporation was organized at the instigation of F. W. MacKay and for the personal benefit of F. W. MacKay, and not otherwise, and said corporation now is, and at all times since its organization, in truth, has been F. W. MacKay who, as an individual, has disregarded the substance and/or form of said corporation and has treated the affairs of said corporation as his own and as a part of his own enterprise;

4. The assets of the bankrupt, as such alone, are insufficient to satisfy the bankrupt corporation's creditors' claims which, under the Bankruptcy Act, are, and/or will be, entitled to allowance in this bankruptcy proceeding;

5. All the debts contracted in the name of said corporation, in truth, were contracted by, in behalf of and/or for the ultimate benefit of F. W. MacKay, as an individual, and not otherwise, and said F. W. MacKay, as such individual, and said bankrupt are debtors, [15] and each one of them is a debtor, of the creditors who, of record herein now appear, or who later herein may appear as creditors only of said bankrupt having allowed and/or allowable claims in this bankruptcy proceeding;

6. The assets of said F. W. MacKay, or so much thereof as are necessary (when added to the assets

of the bankrupt) to pay all the legal expenses of administration herein and to satisfy all claims of creditors which now may be and/or which hereafter may be allowed in the above-entitled bankruptcy proceeding, are subject to be used for the purpose of paying the aforesaid expenses and creditors' claims in the proceeding in bankruptcy.

The court, therefore, concludes as a matter of law that:

The trustee in bankruptcy herein, upon the basis of the aforesaid petition and the facts in support thereof is entitled to have turned over to the estate of the bankrupt all assets of said F. W. MacKay, as an individual, or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the bankrupt's assets) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in the above-entitled bankruptcy proceeding.

Order

It Hereby Is Ordered, Adjudged and Decreed that F. W. MacKay, as an individual, forthwith turn over to John O. England, as the trustee in bankruptcy herein, all of said F. W. MacKay's assets, or at least so much thereof as, added to the assets of the estate of the above-named bankrupt, will be sufficient to pay all legal expenses of administration, and also to satisfy, in full, all creditors of the bankrupt whose claims are proved and

allowable in the above-entitled bankruptcy proceeding.

Dated September 26, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy. [16]

[Endorsed]: Filed Sept. 26, 1947, Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [17]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF
THE REFEREE HEREIN

Now comes F. W. MacKay by the undersigned his attorney, and deeming himself aggrieved by the order of the Referee appointed and acting in this proceeding a copy of which order is hereto annexed, petitions for review of such order by a judge of the above-entitled court, and respectfully represents and shows:

I.

That the order complained of is set forth in the form of Exhibit A hereto annexed and hereby referred to and made a part hereof.

II.

That petitioner alleges errors in respect to the said order as follows:

(1) That the Referee erred in holding that the Petition for Order to Show Cause filed herein by the trustee of the estate of the above-named bankrupt and whereon the said Order to Show Cause is founded states facts or grounds sufficient to support any proceeding against this petitioner or for the granting of any [18] relief against him; and further erred in refusing to dismiss the said petition for failure to state facts or grounds to support such petition.

(2) That the Referee erred in not dismissing for want of equity the said petition of the trustee filed herein.

(3) That the Referee erred in basing the order complained of in whole or in part on the ground that the bankrupt corporation neither at the time it first became a corporation nor at any time since has procured any permit to issue shares of capital stock and that no shares of stock have ever been issued to the officers and/or directors of said corporation or to anyone else.

(4) That the Referee erred in holding and finding that there was any instigation on the part of this petitioner in the formation of the said bankrupt corporation, and further erred in holding and finding that said corporation was formed for the personal benefit of petitioner herein and not otherwise; and further erred in holding and finding that said corporation now is and at all times since its organization or at any time at all has been F. W. MacKay, petitioner herein, and further erred in holding and finding that said petitioner as an in-

dividual has disregarded the substance and/or form of said corporation or either of them or has treated the affairs of said corporation as his own and as a part of his own enterprise, and in each and all of said particulars.

(5) That the Referee erred in holding and finding that all the debts contracted in the name of the said corporation were contracted by, in behalf of and/or for the ultimate benefit of said F. W. MacKay as an individual, petitioner herein, and in each and every particular of said findings, and further erred in holding and finding that said F. W. MacKay as an individual, petitioner herein, is a debtor of the creditors who of record herein now appear or who later herein may appear as creditors only of said bankrupt having allowed and/or allowable claims in this bankruptcy [19] proceeding or that petitioner herein is the debtor individually of any of said creditors present or prospective.

(6) That the Referee erred in holding and finding that the assets of petitioner herein or so much thereof as are necessary (when added to the assets of the bankrupt) or that any assets of petitioner whatsoever or at all are necessary to pay all the legal expenses of administration herein and to satisfy all claims of creditors which now may be and/or which may hereafter be allowed in the above-entitled bankruptcy proceeding, or that any assets whatsoever of petitioner herein are subject to be used for the purpose of paying the aforementioned expenses and creditors' claims in the proceeding in bankruptcy or any or either of them.

(7) That the Referee erred in concluding as a matter of law that the trustee in bankruptcy herein upon the basis of the aforesaid proceedings and the facts in support thereof or any or either of them or at all is entitled to have turned over to the estate of the bankrupt all assets of said petitioner as an individual or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the bankrupt's assets) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in the above-entitled bankruptcy proceeding, or that said trustee, upon any grounds whatsoever, is entitled to have turned over to the estate of the bankrupt any assets of petitioner herein as an individual or otherwise or at all.

(8) That the Referee erred in ordering, adjudging and decreeing that petitioner herein as an individual forthwith or at any time at all turn over to John O. England as the trustee in bankruptcy herein all or any of petitioner's assets or at least or at all so much thereof as added to the assets of the above-named bankrupt will be sufficient to pay all legal expenses of administration and also to satisfy in full all creditors of the bankrupt whose claims are proved and allowable in the above-entitled bankruptcy proceeding, and in ordering, adjudging and decreeing that petitioner herein turn over to said trustee any assets whatsoever.

Wherefore petitioner prays that the said Referee prepare and certify to the above-entitled Court a

record in due form according to law of the proceedings hereinabove referred to and hereby complained of.

That a judge of the above-entitled Court review the said proceedings and record and upon such review reverse the said order of the Referee herein, and further order that said petition of the trustee herein for an order to show cause be dismissed, for such costs as may be allowable against the estate of the said bankrupt, and for such other and further relief as may be proper in the premises.

And petitioner will ever pray.

NATHAN MORAN,

Attorney for Petitioner.

[Endorsed]: Filed Oct. 20, 1947. Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order. Exhibit "A", referred to in this petition already in record.) [21]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW
OF REFEREE'S ORDER

On petition of the trustee the referee, by his order, directed one F. W. MacKay to turn over to the trustee herein all of his sole individual assets, or sufficient thereof when taken with the moneys in the hands of the trustee, the property and assets of the bankrupt, to pay in full the debts of the bank-

rupt, together with the expenses of the administration.

In response to the order to show cause issued on the petition of the trustee for the making of the order hereinabove referred to, MacKay, as a part of the response, asserted that the petition for said order to show cause "does not state facts or grounds sufficient to support any proceeding nor any relief therein prayed nor any relief whatsoever." The referee prior to the entry of his order denied this contention. [22]

There is no contention made by the trustee that MacKay at any time had in his possession any property, money or assets of the bankrupt. The referee did not find that he had and the sole purpose of the proceeding was to require MacKay in a summary proceeding to turn over to the trustee his own individual assets for the purpose of paying the debts of the bankrupt. In making the order the referee assumed that he had jurisdiction over the assets of one not declared to be a bankrupt. In *Hefron v. Western Loan & Building Co.*, 84 Fed. (2) 301 (C.C.A. 9), the Court said: "It is true, as the trustee contends, that, upon the filing of a petition in bankruptcy, all property in which the bankrupt has or may claim an interest passes under the control of the bankruptcy court and, upon adjudication, title to all property of the bankrupt vests in the trustee as of the day of the filing of the petition." This was later approved by the same Court in *Schultz v. England*, 106 Fed. (2d) 764. It is thus clear that the only property that passes under

the control of the bankruptcy court and title to which vests in the trustee is the property of the bankrupt and not the property of anyone else. The jurisdiction that the referee has to order property in the possession of a third person delivered to the trustee is dependent upon the fact that the property so ordered to be delivered is not the property of the third person, but the property of the bankrupt.

The Circuit Court of Appeals of the Eighth Circuit in *In re Rosser*, 101 Fed. 562, in speaking of the right of a referee to require a third person to turn over to the trustee property in his possession, says: "Two essential facts limit this power and condition its lawful exercise. They are that [23] the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made."

It is urged that the referee, by his facts found and order made, pierced the veil of the corporate entity and found that such corporation was at all times, since its organization, in truth MacKay, the petitioner, and as such the debts of the corporation were the debts of MacKay. However, the petition upon which the adjudication in bankruptcy was based proceeded against the bankrupt as a corporation, as an entity separate and distinct from its

stockholders and the owners of the stock. It was adjudicated as an entity against which an adjudication could be made upon the basis that as an entity it was insolvent and could not pay its lawful debts. If it be true that the debts of the bankrupt were in truth and in fact the debts of MacKay, it is difficult to perceive how the referee would acquire jurisdiction to direct that MacKay turn over to the referee his individual assets to pay his debts when MacKay has never been adjudicated a bankrupt. The adjudication in bankruptcy determines a status. The proceedings are in rem for that purpose. *Local Loan Co. v. Hunt*, 292 U. S. 234. The status determined by the adjudication here was that of a corporation, not of MacKay. The adjudication of necessity declared the bankrupt corporation an insolvent. It did not declare MacKay an insolvent, or establish a status as to him in any manner. If it be a fact that the debts of this corporation are the debts of MacKay, it would not necessarily follow that [24] MacKay himself was an insolvent within the meaning and intent of the bankruptcy laws because he did not pay the debts. If all the assets of MacKay may be taken as the referee directs to pay the debts of the corporation on the theory that they are MacKay's, the result could well be an unlawful preference of creditors by the bankruptcy court, for any debts that MacKay might have contracted in his own name and not in the name of the corporation, and outstanding and unpaid, would not be taken into consideration in the distribution of all of his assets. Those of his creditors would receive noth-

ing on their debts because of a lack of notice or knowledge that all of the assets of MacKay were being taken over by the court of bankruptcy for the payment of his debts and without any opportunity for them to appear and prove their debts against him.

It follows, in my opinion, in making the order he did, the referee acted without jurisdiction; that in not sustaining the contention that the petition did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, the referee fell into error.

It Is Therefore Ordered that the order of the referee dated September 26, 1947, directing the petitioner MacKay to turn over all or any portion of his sole individual assets, be and the same hereby is set aside and held for naught.

Done and dated this 30th day of January, 1948.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Jan. 30, 1948. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that John O. England, Trustee of the estate of Burlingame Products Co., Inc., a corporation, bankrupt, hereby appeals to

the Circuit Court of Appeals for the Ninth Circuit from the order made and entered by the above-entitled Court on the 30th day of January, 1948, on Petition for Review of Referee's order dated September 26, 1947, reversing said Referee's order.

Dated: February 27, 1948.

STANLEY M. McLEOD,

JAMES M. CONNERS,

Attorneys for John O. England, Trustee of the
Estate of Burlingame Products Co., Inc., a
Bankrupt Corporation.

[Endorsed]: Filed Feb. 28, 1948. [26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 18, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: April 8, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed April 8, 1948. [27]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL

To: F. W. MacKay, and Nathan Moran, Esq., his
Attorney:

You and Each of You will please take notice, under the provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the Appellant, John O. England, Trustee of the estate of the above-named Bankrupt, intends to rely upon the following points in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court, dated January 30, 1948, reversing the Order of the Referee in Bankruptcy:

I.

That the District Court, in its Order of January 30, 1948, erred in reversing the Order of the Referee in Bankruptcy dated September 26, 1947, directing F. W. MacKay, as an individual [28] forthwith to turn over to John O. England, Trustee, all of said F. W. MacKay's assets, or at least so much thereof as, added to the assets of the estate of the above-named bankrupt, will be sufficient to pay all legal expenses of administration, and also to satisfy, in full, all creditors of the bankrupt whose claims are proved and allowable in the above-entitled proceeding.

II.

That the District Court, in its Order of January 30, 1948, erred in holding that the Referee in Bankruptcy had acted, and was, without jurisdiction to make his Order dated September 26, 1947, directing the said F. W. MacKay to turn over his assets to the Trustee.

III.

That the District Court, in its Order of January 30, 1948, erred in holding that the Trustee's petition for an Order to Show Cause against the said F. W. MacKay did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever and that the Referee in Bankruptcy erred in not sustaining the contentions of MacKay to that effect.

IV.

That the Findings of Fact of the Referee in Bankruptcy are supported by evidence and that the District Court erred in disregarding the mandatory provisions of Supreme Court General Order No. 47 requiring the Judge of the District Court to accept the Findings of Fact of the Referee in Bankruptcy unless clearly erroneous.

Dated this 17th day of May, 1948.

/s/ JAMES M. CONNERS,

/s/ STANLEY M. McLEOD,

Attorneys for Appellant. [29]

Receipt is acknowledged of a copy of the foregoing Appellant's Statement of Points to be Urged Upon Appeal this 17th day of May, 1948.

NATHAN MORAN,

By E. C. Y.,

Attorney for F. W. MacKay.

[Endorsed]: Filed May 17, 1948. [30]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

John O. England, the Trustee of the estate of the above-named bankrupt, having filed his Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the District Court, dated January 30, 1948, files this, his Designation of Contents of the Record on Appeal and does designate the following portions of the record, proceedings and evidence in said cause as the portions of the record, proceedings, and evidence to be contained in the Record on Appeal herein, to wit:

I.

Order of District Court, dated February 24, 1947, adjudging Burlingame Products Co., Inc., a corporation, a bankrupt. [31]

II.

Order of Burton J. Wyman, Referee in Bankruptcy, approving Trustee's Bond, dated April 22, 1947.

III.

Petition of Trustee for Order to Show Cause upon F. W. MacKay.

IV.

Order of Referee in Bankruptcy, dated July 30, 1947, upon F. W. MacKay, to Show Cause.

V.

Transcript of testimony of hearings before Burton J. Wyman, Referee in Bankruptcy, on April 28, 1947, May 14, 1947, and September 8, 1947.

VI.

Response to Order to Show Cause by F. W. MacKay, dated September 8, 1947.

VII.

Order of Referee in Bankruptcy, dated September 26, 1947, on Petition that F. W. MacKay turn over assets to Trustee.

VIII.

Petition of F. W. MacKay for review of Referee's Order dated September 26, 1947.

IX.

Order of District Court, dated January 30, 1948, overruling Referee's Order of September 26, 1947.

X.

Notice of Appeal dated February 27, 1948.

XI.

Appellant's Statement of Points to be urged upon appeal.

Dated this 17th day of May, 1948.

/s/ JAMES M. CONNERS,

/s/ STANLEY M. McLEOD,

Attorneys for Appellant.

Received copy of the within Designation of Record on Appeal this 17th day of May, 1948.

NATHAN MORAN,

By E. C. Y.,

Attorney for F. W. MacKay.

[Endorsed]: Filed May 17, 1948. [32]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 28, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 18, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 18, 1948. [32]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Burlingame Products Co., Inc., Bankrupt, No. 36674 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of May, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk. [34]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 36674-R

Before: Honorable Burton J. Wyman,
Referee in Bankruptcy.

In the Matter of

BURLINGAME PRODUCTS CO., INC., a Cor-
poration,

Bankrupt.

Monday, April 28, 1947—2:00 p.m.

Wednesday, May 14, 1947—2:00 p. m.

21A EXAMINATION

Appearances:

For the Trustee: James M. Conners, Esq., and
Stanley M. McLeod, Esq.

For Certain Creditors: Nathan Moran, Esq. [1*]

The Referee: What witness do you want on the
stand first?

Mr. McLeod: I guess Mr. MacNeil.

*Page numbering appearing at top of page of original Reporter's
Transcript.

ALFRED J. MacNEIL,

called as a witness for the Trustee. Sworn.

Q. (The Referee): Your full name is what?

A. Alfred J. MacNeil.

Q. Where do you live, Mr. MacNeil?

A. 484 Waller.

Q. San Francisco? A. Yes, sir.

Q. What was your connection with the Burlingame Products Company?

A. Secretary and Treasurer.

Q. Are you familiar with the schedules of the bankrupt? A. I am not.

Mr. McLeod: If Your Honor please, no schedules have been filed by the bankrupt corporation.

The Referee: Proceed to examine him.

Q. (Mr. McLeod): Mr. MacNeil, when was the bankrupt corporation organized?

A. I did not get that.

Q. When was the Burlingame Products Company organized as a corporation?

A. I think it was April.

Q. Of 1946?

A. April 1st of 1946. I am not sure, but March or April.

Q. Did you keep the books of the corporation?

A. Partly, yes. My son kept the books.

Q. Your son? What is his name?

A. Malcolm.

Q. Is there in existence a register of the stock, the shares of stock issued by the corporation?

A. I don't know [2] about that. I cannot answer that question.

(Testimony of Alfred J. MacNeil.)

Q. Do you hold any shares in the corporation?

A. I do not.

Q. Do you know if any shares were issued?

A. I do not. None were ever issued to me.

Q. Do you know whether any were issued to Mr. Mauborgne? A. I do not.

Q. Did you draw a salary, Mr. MacNeil?

A. I was supposed to.

Q. What was that? A. \$100.00 a month.

Q. Were you paid at any time?

A. I was not; three months out of six.

Q. You were paid some? A. Yes, sir.

Q. You met Mr. Costello, Mr. John Costello the Assignee for the benefit of creditors of Burlingame Products Company? A. Yes, I did.

Q. Were you the party who gave him the books and papers that he received?

A. Well, I gave him part of them. I did not have them all.

Q. Did you give him all you had in your possession? A. I gave him all that I had.

Q. Where did the capital of the Burlingame Products Corporation come from?

A. We just tried to work it out. We had some machinery there and started in. What capital we got, we made.

Q. You say "We had machinery there". Would you explain that?

A. We had two or three machines there. [3]

Q. By "We" who do you mean?

A. Well, the Burlingame Products Company.

(Testimony of Alfred J. MacNeil.)

Q. Was there a Burlingame Products Company prior to the time the corporation was organized?

A. I could not answer that question. I don't think so, because we went as Burlingame Products when we went there and started it.

Q. Was there a company known as Western Products Company?

A. Well, I had nothing to do with that. I know nothing about it. I think there was, yes, but that was before my time.

Q. Who owned the machinery and assets that you called Burlingame Products Company prior to its incorporation? A. I don't get you.

Q. You say "We had some machines".

A. There was some machinery moved into the building down there.

Q. Who did it belong to?

A. Who did it belong to?

Q. Yes.

A. Well, I had not a thing to do with it before that. I went into this Burlingame Products Company April 1st, 1946.

Q. Yes.

A. And some of this stuff was in the building when I went there.

Q. How did you happen to go into the corporation? Did you put up some money?

A. What?

Q. Did you put up some money?

A. I did not.

Q. How did you happen to be appointed?

(Testimony of Alfred J. MacNeil.)

A. I went in there to work as Secretary and Treasurer, take care of it; help take care of it. [4]

Q. Who asked you to go in?

A. F. W. MacKay.

Q. Was F. W. MacKay connected with Burlingame Products Company?

A. You have to ask him about that. I cannot tell you.

Q. Don't you know of any interest? He is not an officer of the corporation?

A. No, I don't think so, no. No, he was not an officer of the corporation.

Q. Then, you don't know how he is connected with the corporation?

A. I don't know how he is connected with it, how much he is connected with it, or what he had in it, or anything about it. I went in there April 1st, 1946.

Q. Did he ask you to take this position as Secretary and Treasurer so as to look after or protect his interests, if any, in the corporation?

A. He asked me to go in there and look after the money part of the business.

Q. The money part? A. Yes.

Q. Did he say he had money invested in the company?

A. He did not say anything about that.

Q. Did you sign all the checks?

A. I—well, I think I signed most all the checks. The business has a right to sign checks, as well as I did, Joe Mauborgne.

(Testimony of Alfred J. MacNeil.)

Q. In an unlimited amount? A. Yes.

Q. Were any meetings of the Board of Directors of the corporation held, Mr. MacNeil?

A. When we organized you mean, afterwards, before, or when?

Q. Any time during the life of the corporation?

A. I think there was a meeting when we organized. That is [5] all that I recall.

Q. Just one meeting? At least, only meeting at which you were present?

A. That is right, that is the only meeting I recall.

Q. Who are the officers or directors of the corporation?

A. Myself, Joe Mauborgne and Jack Helms?

Q. How do you pronounce Mauborgne?

A. Mauborgne.

Q. He was the President?

A. He was the President.

Q. Mr. Helms was the Vice-President?

A. That is right.

Q. And who were the directors?

A. The three.

Q. Just the three of you?

A. That is right.

Q. (By Mr. Connors): Mr. MacNeil, where was the place of business of the Burlingame Products Company? A. 621 California Drive.

Q. You were asked to go into the corporation by Mr. MacKay to look after the money part of the corporation. I think I am quoting your words?

A. That is right.

(Testimony of Alfred J. MacNeil.)

Q. Where was the bank account carried?

A. The Bank of America in Burlingame.

Q. How much money was in the bank when you became connected with the corporation?

A. My first deposit, I think, was about \$700.00. I am not sure.

Q. And what was the source of the \$700.00? Where did you get it?

A. Well, some money that was handed to me by Mauborgne. I believe, I think it was by Mauborgne.

Q. Was that cash or a check?

A. I think it was a check. I know it was a check.

Q. Was it Mr. Mauborgne's check?

A. No, it was not. It was a check from—I cannot recall right now the name of the firm.

Q. Was it Mr. MacKay's check? A. No.

Q. Did Mr. MacKay give you any money to deposit in this account?

A. He gave me some money to pay for the electric wiring of the building.

Q. And how much did he give you?

A. No, I cannot recall that right off. It was two or three different times. One time it was \$360.00, I believe, to pay for the electric wiring. One time it was \$100.00 to pay for some fence at the back of the building.

Q. For what?

A. Some fence that we put in back of the building.

(Testimony of Alfred J. MacNeil.)

Q. That is \$460.00. Did you get any other money from Mr. MacKay?

A. Yes, I think the electric wiring came to about \$800.00 or \$1,000.00 and I think he gave me the money to take it all up, whatever it was. I don't just recall what it was.

Q. Now, do the records show that?

A. The records should show that. I turned those records over and I do not have access to those records; I did not have access to those records after September. I don't know when this bankruptcy or anything was filed, but after September 30th I had no connection with it [7] at all.

Q. September 30th?

A. September 30, 1946.

Q. Why did you ask Mr. MacKay for this money to take care of these repairs and installations?

A. Why? I did not ask him.

Q. You did not? A. He furnished it.

Q. Who told Mr. MacKay that the money was needed?

Mr. Moran: That is objected to, Your Honor, as calling for hearsay.

The Referee: This is a 21a examination. You see, we are not bound by rules of evidence.

A. I am telling you, this stuff was mostly done before April 1st when I went in there. I don't recall just when this organization was put together, but I do know I went in about April 1st.

Q. (By Mr. Connors): Well, to refresh your memory. Mr. MacNeil, the corporation was or-

(Testimony of Alfred J. MacNeil.)

ganized on March 16, 1946. I have a certified copy of the Articles of Incorporation.

A. Well, I don't recall just when it was, but I know about April 1st is when I went down there and was getting things ready to open up.

Q. Did you go down there at Mr. MacKay's request? A. I did.

Q. And then, was this \$1,000.00 or more given to you before April 1st or after April 1st?

A. After.

Q. All right. Now, did you ask Mr. MacKay for this money?

A. I did not. The contract was already made and whoever made [8] the contract, whether him or Joe, who it was, I don't know. I did not have anything to do with the wiring contract. I did not know anything about it until I got down there and the bill came in. They knew about it; he knew about it.

Q. Who do you mean by "He"?

A. Joe knew about it and Mr. MacKay, I suppose, knew about it. Anyway, that is where the money came from. I think it was \$100.00 check and a \$700.00 check, if I am not mistaken, or a \$800.00 check. I don't recall the electric bill exactly.

Q. But, you did not ask Mr. MacKay for it?

A. No, I did not ask him for it.

Q. Do you know who asked him for it?

A. No, I think the bill was just presented there. I don't suppose anybody asked for it.

Q. Was Mr. MacKay there from time to time?

(Testimony of Alfred J. MacNeil.)

A. He was there a little while. He left some-time in April, I don't know when.

Q. That is the time he went to Tahiti?

A. Yes.

Q. What was Mr. MacKay's connection with the business?

A. You will have to ask somebody besides me about that, what his connection was. All I know is, I went down to go to work and was to make it out of the business.

Q. What is Mr. MacKay's business?

A. You cannot prove that by me.

Q. How long have you known him?

A. About seven or [9] eight years.

Q. What was his business prior to April 1st when he told you to go down to the Burlingame Products Company?

A. What was his business?

Q. Yes.

A. I can tell you the only thing I know about his business. He is a stockholder in the book concern I am in now.

Q. Do you mean the place of business in this building on 7th Street?

A. That is right. Now, that is all I could tell you about his business. Outside of that I don't know what business he has got.

Q. Were you at the Burlingame Products Company every day?

A. Yes, I think most every day for six months.

(Testimony of Alfred J. MacNeil.)

Q. Prior to Mr. MacKay's trip to Tahiti, how often was he at the place of business?

A. Well, sir, I could not answer that question; probably three or four times, maybe, that I know of. He may have been there many times that I did not know about.

Q. Did you consult with Mr. MacKay regarding the operation of the business?

A. No. The business was not started when he left.

Q. It was not started?

A. It was not doing any business. We was opening up, getting ready to open up.

Q. Did you discuss with Mr. MacKay the details about getting ready to open up? A. I did.

Q. What matters did you take up with him?

A. I don't think I took up anything in particular, only about the building and the rent and a few things like that.

Q. You say you took up with him about the building. Was it about the design?

A. No, I do not know a darn thing about that.

Q. What was the discussion with him regarding the building?

A. About where the wiring was being put in, the amount of wiring they had to have.

Q. Did you discuss the cost of the wiring with him?

A. No, I did not know about the cost of the wiring. I did take up the cost of the wiring first, when I first heard about it being about \$350.00.

(Testimony of Alfred J. MacNeil.)

Q. Outside of this money you got from Mr. MacKay for the wiring, what other investment or moneys did he put into the operation of the business?

A. What other moneys did he put in?

Q. Yes.

A. I could not answer that question.

Q. Who would know the answer to that question?

A. Well, if he put in any that I knew of, I would know about it, but any other moneys, as far as I know, I cannot exactly answer that. The amount of money he gave to me to put in to pay for these bills, I just explained it at the time.

Q. But, all the money he did give you is reflected on the books?

A. All the money he gave me or anybody else gave me is on the book, the bank book.

Q. Is there a record among the corporation's records of this money you received from Mr. MacKay? [11]

A. I don't know whether it is on the corporation's records or not. I marked it on mine. I could not answer about the corporation records.

Q. This corporation was manufacturing bird cages, was it not?

A. That is right.

Q. Was that a patented cage?

A. I don't think so; I don't know. If there was any patent on it, I don't know about it.

Q. Had Mr. MacKay been interested in a similar business before this organization?

A. The only business I know of him being interested in was a dog business before that.

(Testimony of Alfred J. MacNeil.)

Q. Was that the business Mr. Mauborgne was connected with?

A. No, he is in the bird stores. He has canaries.

Q. What was the name of the dog business Mr. MacKay was in?

A. He was just handling dogs of his own, bought and sold them; show dogs. That is the only business I know he was in before that.

Q. Did you know anything about the Western Products Company on Precita Avenue, here in San Francisco?

A. No. I have heard about it, but I do not know anything about that. That was before my time. I have heard a great deal about it.

Q. How long after April 1st did Mr. MacKay leave for Tahiti?

A. I could not answer. I don't remember when he did leave.

Q. Did he return before the 1st of September when you left the business?

A. Just about that time, I think. [12]

Q. Did he come down to the place?

A. Not while I was there.

Q. While he was away, did you communicate with him? A. That was impossible.

Q. You are certain you did not write any letters to Mr. MacKay in Tahiti?

A. I certainly did not.

Q. Advising him of the progress of the business?

(Testimony of Alfred J. MacNeil.)

A. I did not think it was necessary, because I did not think I could get him.

Q. Did your son write to him?

A. No, not that I know of.

Q. Did Mr. MacKay write to you?

A. I don't think so. I don't think I ever heard from him while he was gone.

Q. After he returned, did you discuss the business with him?

A. Some time after, yes, not very soon, because he was sick for a while. I did not see him.

Q. Did Mr. MacKay receive any money from the business? A. Not that I know of.

Q. Did you sign any checks payable to Mr. MacKay?

A. I did not. I signed some payable to MacNeil that I never got.

Mr. Conners: That is all.

(Witness excused.)

JOSEPH O. MAUBORGNE,

called as a witness for the Trustee. Sworn.

The Referee: Joseph O. Mauborgne? [13]

A. Joseph O. Mauborgne, M-a-u-b-o-r-g-n-e.

The Referee: Proceed.

Mr. McLeod: How do you pronounce your name?

A. Mauborgne.

Q. Mr. Mauborgne, you are President of the Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

(Testimony of Joseph O. Mauborgne.)

A. I am, or I was, yes.

Q. Well, you were. Did you invest any money in the corporation?

A. At various times when we were a little on the downward grade, I put a little money in. Not in the corporation itself, no.

Q. I am talking about after you were manufacturing the cages.

A. I put no personal money in there.

Q. Were you formerly connected with the Western Product Company? A. I was, yes.

Q. Was that a corporation?

A. No, it was not.

Q. What was your connection with the company?

A. Well, ran that company with the financial backing of Mr. MacKay.

Q. You ran that company with the financial banking of Mr. MacKay? A. That is right.

Q. Did you put any money in the company?

A. At various times I had to put in something, yes.

Q. I mean, as an investment or to keep it running? A. To keep it going.

Q. During what period were you running the Western Products Company?

A. I don't know the exact date I [13] started, but I believe August or September of 1945.

Q. And when did you become associated with the Burlingame Products Corporation?

(Testimony of Joseph O. Mauborgne.)

A. The date the corporation papers were filed.

Q. Did the Burlingame Products Corporation take over the assets of the Western Products Company?

A. It took over everything I had. It was given to Mr. MacNeil at that time, yes.

Q. What did you get?

A. I don't know. I believe the check was \$800.00 and something.

Q. Are you talking about cash?

A. No, talking about a check.

Q. A check for \$800.00?

A. \$800.00 odd, I believe. It might have been \$700.00 and something.

Q. Was the Burlingame Products Corporation formed as a successor of the Western Products Company?

A. I don't know that I would say successor, practically the same thing going again. I don't think it would be the successor.

Q. Where is the machinery, fixtures, and equipment of the Western Products Company?

A. Turned over to Burlingame Products Company.

Q. And *there* belonged to whom?

A. I would not exactly know, to say who they belonged to. They were built up by the company.

Q. Who owned the Western Products Company?

A. I could not state now; I could not say one way or the other [15] who the exact owner of the company was.

(Testimony of Joseph O. Mauborgne.)

Q. Did you own it?

A. I was working for commissions.

Q. Who was your employer?

A. I would not say I had an employer. Mr. MacKay advanced the money, the financial part of the business for me to run it. I don't really consider I was working for him.

Q. When did Mr. MacKay advance that money?

A. I believe August or September of 1945.

Q. Do you recall the arrangement or any conversation you had with Mr. MacKay when he advanced the money? What was the understanding between you?

A. I was to get 50 per cent of the profits.

Q. Who was to get the other 50 per cent?

A. Mr. MacKay would have drawn that back out towards the money he advanced, I imagine.

Q. Did he withdraw any moneys?

A. No, sir, he did not.

Q. Was the business a profitable one?

A. No, it was not.

Q. Then from August or September, of 1945, to the middle of March, 1946, you ran the Western Products Company or operated it?

A. That is right.

Q. Did you? A. That is correct.

Q. Was it in the same line of business as the Burlingame Products Company?

A. That is correct.

Q. Manufacturing bird cages?

A. That is right, and bird supplies.

(Testimony of Joseph O. Mauborgne.)

Q. Who suggested that the Burlingame Products Company be organized? [16]

A. Mr. MacKay.

Q. Did he inform you of that fact? What did he say to you about it, if anything?

A. He said that we should make a corporation of it.

Q. What was to be done with the assets of the Western Products Company?

A. The assets of the Western Products Company were turned over to Mr. MacNeil. They were not really assets. What cash we had on hand, was not assets, because we owed that much or more.

Q. Mr. MacNeil who just testified as Secretary and Treasurer of the Burlingame Products Company?

A. That is correct.

Q. You were to get 50 per cent of the profits of Western Products Company and Mr. MacKay decided you ought to have a corporation. Had you received any profits from the Western Products Company?

A. No, sir, I had not.

Q. What was the financial arrangement, the financial standing between you and Mr. MacKay when he suggested that you incorporate? Were you to get something representing your profits in the Western Products Company?

A. There were no profits in the Western Products Company.

Q. What were you to get in the Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

A. I was working on the same basis, but there was no written agreement to that effect.

Q. In the Burlingame Products Company what were you to get if it was profitable?

A. I would have got 50 per cent if it was profitable. [17]

Q. Who was to get the other 50 per cent?

A. It was to go to the corporation, I imagine. That is the only understanding I had.

Q. Was it agreed how many shares of stock you were to receive from the Burlingame Products Company?

A. I know nothing about stock. I never saw the books or anything.

Q. Are you a stockholder?

A. Not that I know of. I don't know a thing about it.

Q. Are you a Director of the corporation?

A. Well, I was put in as President. I imagine I was a Director.

Q. Did you ever attend a Director's meeting?

A. I attended a meeting, not a Director's meeting. They held a Director's meeting.

Q. Where was that held?

A. In Mr. Moran's office, I guess some time after April, when the papers came back.

Q. Who told you you were to get 50 per cent of the corporation's profits at the Burlingame Products Company after it was organized?

A. As I say, I have nothing in writing. I just understood that was going to be my salary.

(Testimony of Joseph O. Mauborgne.)

Q. Who gave you that understanding?

A. Well, Mr. MacNeil, the Vice-President, myself, and Mr. MacKay, all of us had that understanding. There wasn't anything written up about it though.

Q. Do you know, as President of the corporation, whether anyone aside from the Western Products Company or Mr. MacKay invested [18] any money in the Burlingame Products Company?

A. Yes, I do.

Q. Who?

A. There was with me, Mr. Wehr. He put money in one time.

Q. I don't get the name? A. Wehr.

Q. Who is he?

A. He happens to be my brother-in-law.

Q. How much did he put in?

A. I think somewhere around \$400.00-odd.

Q. When was that, Mr. Mauborgne?

A. Around November or December, I believe, of 1945. You are talking of the Western Products Company, aren't you?

Q. That was in the Western Products Company?

A. That is correct.

Q. Well, did you invest any in the Burlingame Products Company? A. No.

Q. Do you know of anyone—I will repeat my question—do you know of anyone besides Mr. MacKay and the Western Products Company who did invest any money, fixtures, property or assets?

(Testimony of Joseph O. Mauborgne.)

A. You mean as a gift or something? No, I do not.

Q. So far as you know, did all this money, machinery, everything else come from Mr. MacKay?

A. I would not say it all came from Mr. MacKay, no. It came from the original start he gave me, machinery we brought as we worked along. He did not purchase all the machinery in the place by any means. [19]

Q. He set you up as the Western Products Company?

A. He started me out as the Western Products Company with \$1,500.00. I paid \$1,400.00 for machinery in it. He financially backed me in the business.

Q. Did you sign checks on the Burlingame Products Company?

A. Once in a while. My job was doing the buying. When I went to buy, if it was a small amount, whatever material I picked up, I gave a check for.

Q. Did you have authority to draw any amount on the bank account?

A. Up to \$100.00; over \$100.00 it required two signatures.

Q. Who were the two signatures?

A. Mr. MacNeil and myself.

Q. Mr. MacNeil and yourself, you say?

A. That is correct.

Q. Did the Burlingame Products Company own any automobiles, or trucks?

(Testimony of Joseph O. Mauborgne.)

A. Yes, it did. We owned a truck. I would say, not that we owned it. I don't know whether to say we owned it or not. I financed the truck myself in my own name. The truck was actually carried in my name until we went through bankruptcy or the Court over here, and I turned the pink slip over to the then-existing——

Q. Mr. Costello?

A. No, I turned it over to the man that bought the place down there. The truck at that time was still in my name.

Q. It was in your name, but belonged to Burlingame Products Company?

A. I would say legally that it [20] belonged to it, yes.

Q. You don't claim that it belonged to you individually, do you?

A. No, I do not. I claim it was carried under my name, not the name of the company.

Q. Whom did you endorse the pink slip to, Mr. Mauborgne?

A. I cannot remember the name of the fellow—Jarnigan. I don't know whether I endorsed it to the name of Jarnigan or the name of the company Jarnigan is now running. In fact, I don't believe I endorsed it at all. I signed the slip and he put his own name in.

Q. Was that turned over at the request of Mr. Costello?

A. No, it was not. I turned it over on my own

(Testimony of Joseph O. Mauborgne.)

hook. I had the pink slip in my pocket and I wanted to get rid of it.

Q. How did it happen that you turned the truck over to Mr. Jarnigan when you had not turned it over to Mr. Costello, the Assignee for the benefit of creditors?

A. I understood that whatever his name is, down there, bought the place. I figured the truck went along with it.

Q. Did Mr. Costello ever ask for the truck?

A. I never heard a word about it.

Q. Do you know whether he knew the corporation had it?

A. I could not even tell whether he knew that or not.

Q. Did you draw a salary from the corporation, the Burlingame Products Company?

A. No, I did not draw a salary. I believe I drew \$100.00 or \$150.00 for mileage and gasoline for my car. [21]

Q. And that is all? A. That is all.

Q. Do you know whether any shares of stock were issued? A. I do not know.

Q. Did you get any? A. I did not.

Q. Do you recall at the organization meeting, whether it was agreed as to who should get shares of stock?

A. Yes, I believe—I don't know whether it was agreed who would get shares of stock—but I believe all the officers were going to take stock. I be-

(Testimony of Joseph O. Mauborgne.)

lieve we arranged that we would buy one share, two shares, four shares, some odd sum.

Q. How many were you to get, do you recall?

A. I could not tell exactly now. I believe it was \$100.00 or something like that.

Q. (By Mr. Connors): How long was the Western Products Company in business on Precita Avenue?

A. I don't know the exact date. I believe from August or September until the following April.

Q. And why was the business moved from San Francisco to Burlingame?

A. We had a fire in the place and had inadequate wiring. I was requested by the Fire Department to close the building up. The electrical department closed the building up. We had no building to go to. I could not find a suitable one in San Francisco.

Q. Who found the place in Burlingame?

A. Mr. MacKay located it first.

Q. He did? Did you have a lease or a month-to-month tenancy [22] down there?

A. We had a lease.

Q. Whose name was the lease taken in?

A. We had it put in the corporation.

Q. The lease was in the name of the corporation?

A. That is correct.

Q. And were any payments made on the lease?

A. Yes, we paid the first month and the last two months, I believe.

Q. How was that paid?

(Testimony of Joseph O. Mauborgne.)

A. Cash money, or a check rather.

Q. A check of the corporation?

A. I don't believe it was. I believe it was a check on Western Products Company, because we had arranged for the building some four or five months before we got it.

Q. Was the Western Products Company a corporation? A. No, it was not.

Q. I have before me a letterhead, Joseph Mauborgne, President and General Manager.

A. Well, we just put that in there for no reason. We had no corporation or anything. That was just the way we listed it.

Q. Was the Western Products Company a fictitious name? A. I imagine it was.

Q. Used by F. W. MacKay?

A. I would not say it was used by F. W. MacKay, no.

Q. Do you know whether a certificate of doing business under the name of Western Products Company was filed by Mr. MacKay?

A. I could not tell you that. [23]

Q. This profit sharing agreement between you and Mr. MacKay, was that verbal or in writing?

A. Verbal.

Q. Did you have any interest in the business other than the right to receive 50 per cent of the profits?

A. What do you mean by interest?

Q. Did you own any part of the business?

A. Did I own any part of the business?

(Testimony of Joseph O. Mauborgne.)

Q. Yes.

A. I don't know whether you would say I owned it. I put some money in.

Q. How did you put it in, as a capital investment?

A. No, it was not a capital investment. We were short on the payroll, something like that, especially after we had that fire.

Q. I will put it this way: Were you a partner of Mr. MacKay's?

A. No, I would not say I was a partner.

Q. What would you say?

A. I would not know under the arrangement what I was.

Q. Were you responsible for any bills of the Western Products Company?

A. Well, I paid several of them, yes.

Q. Why did you pay those, because of partnership obligations?

A. Because, I had signed for them. I had signed to turn the gas and lights on. I signed things like that myself. Someone had to sign or the gas and light company would not turn it on.

Q. Those are the only bills you paid?

A. That is correct.

Q. Were you liable for the other bills?

A. I imagine I was liable for the other bills. I would have been; I signed for [24] everything. I was the one doing the buying, except the gas and electric, and I signed that.

(Testimony of Joseph O. Mauborgne.)

Q. In what name was the bank account carried?

A. Western Products Company.

Q. Did you have authority to draw checks from the bank account? A. Everything.

Q. Did Mr. MacKay draw any checks on the bank account? A. No, he did not.

Q. Did he have authority to do it?

A. He did.

Q. Now, you testified you got \$1,500.00 from Mr. MacKay when the business opened. Did he put in any other money?

A. He did. On Precita Avenue, you mean?

Q. Yes.

A. After the fire he put in another \$500.00, I believe. I did not even have money to make the payroll and I had a completed bunch of cages burned. At that time I think he invested another \$500.00 or \$600.00 after that time, prior to the time we moved to Burlingame.

Q. How much money did you put in the Western Products Company?

A. I would not be able to know. I never kept track of it.

Q. Was that a loan?

A. No, it was not a loan. I just put it in as I needed it, that is all.

Q. Well, how were you to get it out, as the repayment of a loan, or was this to come out in your 50 per cent profit-sharing arrangement?

A. I made no arrangement about it.

Q. Now what authority did you have in the

(Testimony of Joseph O. Mauborgne.)

Western Products Company? The letter said Martin R. Wehr was General Manager. [25]

A. He was the shop foreman, really. That is all he was.

Q. Who was in charge of the business, you?

A. I was.

Q. After the Burlingame Products Company was organized, were you still the manager?

A. No, I was not. I had nothing to do with the inside of the shop at that time. I hired a foreman other than Mr. Wehr.

Q. Who fixed the prices at which the cages would be sold?

A. The established prices of the Western Products Company.

Q. You continued to sell at the same price?

A. Yes, we did.

Q. Now, when you moved to Burlingame, was Mr. MacKay in San Francisco at that time, or had he gone to Tahiti?

A. No, he was here at the time we moved down. I don't know whether he was. We were so long straightening up, a month or a month and a half before we moved there. I don't know just the exact date he left.

Q. Who had charge of hiring and firing the employees?

A. The foreman we had at the time we went to Burlingame.

Q. Who was the immediate superior of the foreman?

A. Either Mr. MacNeil or myself.

(Testimony of Joseph O. Mauborgne.)

Q. How often was Mr. MacKay at the Burlingame place?

A. I think he was only there four or five times. That is all I saw him. I was not there all the time, myself. I did most of the buying.

Q. What conversation did you have with Mr. MacKay regarding the operation of the business?

A. Well, nothing [26] so far as the financial is concerned.

Q. Who took those up with him?

A. Those were taken up with Mr. MacNeil.

Q. What discussion did you have with Mr. MacKay as part of the business?

A. He came and looked where we had the welders set up and suggested a different arrangement for the welders. On the machinery, he thought we ought to have a well-equipped plant; he suggested that we order different machinery from time to time, improve our plant, if we obtained enough money to buy it.

Q. Why was Mr. MacKay making those suggestions?

A. Why was Mr. MacKay making those suggestions?

Q. Yes.

A. I guess it came into his head to make them. He was financially interested. Certainly, a man that put his money there would have something to say, wouldn't he?

Q. What financial interest did Mr. MacKay have in the corporation?

(Testimony of Joseph O. Mauborgne.)

A. Other than putting up some money, I don't know. Evidently, he would have been a stockholder, or is a stockholder if stock was issued.

Q. How much did he put in the corporation?

A. I cannot tell that. I never saw the books or knew anything about them until they were taken over by John Costello.

Q. You were asked about a truck which you say you turned over to the purchaser?

A. That is correct, a Chevrolet Pick-up. Originally, I believe \$180.00 or \$190.00, the original purchase price, was paid out of money from the Western Products Company. The balance was carried on a financed loan from the Seaboard Finance Company in my name and paid off by the Burlingame Products Company in a lump sum after I believe two or three payments were made.

Q. Those payments were \$35.60 a month?

A. I don't remember exactly; somewhere in there, yes.

Q. This truck was subject to a chattel mortgage to the Seaboard Finance Company and the mortgage also carried a 1937 Olds Sedan?

A. That is right; that was my car. I was financing a car there at the same time, that it was necessary to finance the truck. When I came down with the truck, they put the two into one contract, but the payments made by the Burlingame Products Company in the account book will not show the full \$35.00. Each month. I paid one month and the Burlingame Products Company the next month.

(Testimony of Joseph O. Mauborgne.)

Not the total amount of that was paid by the Burlingame Products Company.

Q. While Mr. MacKay was in Tahiti did you ever communicate with him?

A. I did not. I have never written a letter to Mr. MacKay in my life either here or any other place.

Q. Did you ever hear from him while he was gone? A. I never did.

Mr. Conners: That is all.

(Witness excused.)

The Referee: Call your next witness. [28]

F. W. MacKAY

called as a witness for the Trustee, sworn.

The Referee: Your full name is what?

A. F. W. MacKay.

The Referee: Proceed.

By Mr. McLeod:

Q. Mr. MacKay, you have undoubtedly heard the testimony of Mr. MacNeil and Mr. Mauborgne?

A. I have, sir.

Q. And reverting back to the Western Products Company, is Mr. Mauborgne's testimony correct wherein he stated that you had financially backed him in the Western Products Company?

A. That is right.

Q. With an agreement that he was to get 50

(Testimony of F. W. MacKay.)

per cent of the profits and you to get the other 50 per cent? A. That is correct.

Q. In March of 1947, the Burlingame Products Company was organized as a corporation, was it? 1946, beg pardon. Was that at your suggestion or instigation or desires?

A. Do you want to get a statement?

Q. Yes, we would like to have your statement.

A. I will give it *to*, if you wish me to.

My understanding of the whole operation is that in about August of 1945 Mr. Mauborgne found a chap that lived, I think at the time it was on O'Farrell, it may have been another street, that had a little welder and some other equipment for making bird cages. He became interested in this stuff and came [29] and asked me if I would purchase it for him; I went over and saw this equipment and agreed to purchase it, put him in business; Mr. Mauborgne thereupon leased a store—what was that street?

Q. Precita?

A. Yes. The welders were put in there and the equipment was moved in. Mr. Wehr, sitting back there, his brother-in-law, and Joe ran the shop; I was the angel of the outfit, in my opinion. That is what I was. Then, as things became difficult and more difficult. I kept putting in money. I could not tell the exact amounts or the exact specific time. If you wish it, I can look up the old checks and see exactly what I paid in. Sometimes it would be \$100.00, sometimes \$200.00, \$300.00, \$400.00, or

(Testimony of F. W. MacKay.)

\$500.00, depending on the needs of the welder outfit to operate. I was not interested particularly in the management of it. That was left entirely to Mr. Mauborgne and Mr. Wehr. I backed him financially. I liked Joe and I liked his brother-in-law. I wanted to see them make something out of it. That started the Western Products Company, as far as I know.

Q. Well, the Western Products Company ended in March, 1946, and the Burlingame Products Company began?

A. My understanding then was, that in return for the money I had put in, that I was to take over the assets and they were to be turned into the Burlingame Products Company when formed and I would get stocks in the Burlingame Products Company in return for the money I had put in. [30]

Q. Was there an amount agreed upon by you?

A. Well, I believe there was an amount agreed upon for the value of the equipment and so forth of the Western Products Company, but I would have to talk that over with Mr. Moran. He was the corporation's counsel. The facts of the matter are, that at that time I had been serving here during the war in defense work and I wanted to get back to my residence in Tahiti and I simply dumped the whole thing in Mr. Moran's lap, to get the corporation in shape. I did not want to take personal responsibility for the corporation. I wanted to get out of the country. In fact, when I went to Tahiti,

(Testimony of F. W. MacKay.)

I did not expect to return, but I found conditions so bad that I returned.

Q. How many shares of stock were you to get?

A. I cannot remember what was to be issued for the proportionate amount of equipment and assets turned in by the Western Products Company and the additional money I put in. In fact, I noticed one statement was not made here. Just before I left, I gave Mr. MacNeil a check for \$2,000.00 to carry them along. If you wish to, I think you can verify that through Mr. MacNeil.

Q. Wasn't the amount that was agreed upon as your investment about \$8,000.00?

A. No, I could not say as to that. I could say probably somewhere in that neighborhood. I don't remember now exactly the amount agreed on. It was what they considered the value of what I had put in.

Q. Were you ever a stockholder of the Burlingame Products Corporation?

A. I have never received any stock. [31] I was supposed to receive stock for the moneys and equipment put in. I never have received any.

Q. Do you know why you did not?

A. I spoke to Mr. Moran about why no stock was issued. He said they never had been able to receive a——

Q. Permit?

A. A proper statement from the officers of the Burlingame Products Company to present to the——

(Testimony of F. W. MacKay.)

who is the chap who issues stock? You have a name for it in California.

Q. The Corporation Commissioner?

A. The Corporation Commissioner.

Q. Who is Mr. Helms?

A. Mr. Helms was a friend of mine who was my immediate superior, the Director of Civilian Defense in San Francisco during the war and I served as a staff officer under him.

Q. Was he at all active in this corporation?

A. You see, I left just after it was formed, for Tahiti and I never returned until it was bankrupt.

Q. Did he invest any money in the corporation?

A. I believe each one of the officers had to agree to make an investment. I don't know what the amount was. That you could probably get from the stock.

Q. Were you to make any other investment than the amount you already invested?

A. Nothing definite was understood about that, but just before I left, as I say, I did invest an additional \$2,000.00. That was turned over to Mr. MacNeil. [32]

Q. You don't know whether Mr. Helms put any money in?

A. That I could not say. I don't know what the others did. I can testify to my own investment.

Q. Did you introduce Mr. Helms to the business, as it were?

A. Well, yes.

Q. And did you install Mr. MacNeil as the Sec-

(Testimony of F. W. MacKay.)

retary and Treasurer of the Burlingame Products Company?

A. I would not say I installed him, no. At the time of the organization, he was elected as Secretary-Treasurer.

Q. Did you have any understanding with him that he, while serving as such officer, should sort of look after your interests, see that they were properly protected?

A. Naturally, he would look after the interest of any stockholders. I believe it is the bonded duty of a treasurer, at least, in any other corporation I am connected with.

Q. Aside from the ordinary general obligations of an officer, did you and Mr. MacNeil have any conversation or understanding on that score?

A. Just that we are friendly and I hoped and believed he would be an honest treasurer for the company. I had confidence in him; the others seemed to have, and he was elected.

Q. Had you had previous business dealings with Mr. MacNeil?

A. I am associated with his son in business in the MacNeil Book Store. Mr. MacNeil was in the store.

Q. You have known him for a period of time prior to the corporation?

A. I have know him six or seven [33] years. I always found him to be a very honest gentleman.

Q. Well, were you the one who suggested his name as Secretary-Treasurer?

(Testimony of F. W. MacKay.)

A. I cannot say exactly who nominated him Secretary-Treasurer.

Q. Did you tell Mr. Mauborgne or Mr. Moran that you knew Mr. MacNeil?

A. I suggested that he come into the corporation, yes. I don't remember exactly who nominated him for his position.

Q. I did not mean the nomination.

A. Right.

Q. I mean the investment for the stockholding. Are you a creditor of the Burlingame Products Company, Mr. MacKay?

A. I have already told you I am the angel. What I have got in has gone.

Q. Well, have you filed any proof of debt in this proceeding?

A. I don't claim anything, because I consider what I put in there as lost. I took a gamble on the ability of this gentleman to make money; he did not. All right; I lost it.

Q. Do you intend to file a claim?

A. I don't see that I have a right to file a claim honestly, now. I intended honestly to buy stock in it; I have no claims against it.

Q. Mr. MacKay, you were getting, rather it was intended that you would get 50 per cent of the profits of the Western Products Company?

A. I think Joe has got that a little—oh, the Western Products?

Q. The Western Products.

(Testimony of F. W. MacKay.)

A. Yes, if there was any profit I [34] was to get 50 per cent of the profit.

Q. When the assets of the Western Products Company were turned into the Burlingame Products Company, what proportion, in the form of shares of stock, were you to get?

A. I think it amounted to somewhere between \$6,000.00 and \$8,000.00. I forget how much stock I was to get out of it. I believe Joe was to get something like \$500.00 of stock. I have forgotten now, for his investment, and I made the personal agreement with Joe that—that is, we made the personal agreement, the corporation, that he was to receive a salary of 50 per cent of the profits. That was generally understood. I don't know if it was ever voted on or anything like that. I think it was generally understood. At least, that would have been my understanding if there had been profits, so far as my dividends. I would have honestly given him half of it.

Q. (By Mr. Conners): Were you the sole owner of the Western Products Company, Mr. MacKay?

A. I never considered I was the owner at all. I considered that I backed Mr. Mauborgne in the company pure and simply. He was the owner and operator of it because I, simply, as I said, was the angel of this thing, and I have been of all parts of it, so far as I see.

Q. Then, all the assets of the Western Products

(Testimony of F. W. MacKay.)

Company were owned by Mr. Mauborgne. Is that it?

A. Well, it was my understanding that when the Burlingame Products Company was organized, those were turned over to me in [35] a way for the money I had invested in there. That is the reason I did not want to run it as a privately owned thing with me out of the country. That is the reason the corporation was organized. They had to have more money, had to be moved. I think Mr. Mauborgne or one of the gentlemen testified there had been a fire out there and the wiring was inadequate and they had to have more money, had to have a new place, and my understanding was the assets were to be turned over for what I invested and turned into the Burlingame Products Company at the moment of inception of the corporation.

Q. As I understand it, if you had not intended to take your trip out of the United States, the corporation would not be organized?

A. I think it would have been, yes, because the investment was becoming heavy; I would not have put in additional sums of money. I think subsequent to moving to Burlingame, probably I put in \$3,000.00 or \$4,000.00. I could not tell the exact amount, somewhere around there.

Q. Was Mr. MacNeil selected to watch your financial interests?

A. He was selected to watch all the financial interests, because of my belief that he was honest and the rest of us agreed he was honest.

(Testimony of F. W. MacKay.)

Q. If you had not made the trip to Tahiti, there would have been no necessity of having anybody watch your interests?

A. We would have formed a corporation anyway, because I believe in corporations. I believe it is the only way to conduct a business, personally.

Q. How long after the corporation was formed did you make your trip?

A. I left here about the 2nd day of May, approximately.

Q. So, that was about six weeks after?

A. It was in May that I left for Tahati.

Q. Mr. Mauborgne said that you were down to the new place of business in Burlingame and made remarks about the installation of equipment, comments about new equipment.

A. Naturally, as I have gone to an Arizona mine and looked at the mine and other properties I am interested in. A stockholder, although not a director, is always interested in a corporation. At least, I am. I am not a director of the MacNeil Company, but I often drop in to speak to Mr. MacNeil and to see how they are getting along. Naturally, I am interested. It is a corporation, and successful.

Q. What is your business, Mr. MacKay?

A. I am retired, but in my active days I was interested in mining in the Northern Range of Wisconsin and Minnesota.

I might say that nobody regrets the failure of this company more than I do. I had great hopes

(Testimony of F. W. MacKay.)

that it would be successful or I would not have gone to the expense I did to try to set it up right, try to equip it with good machinery.

Q. How old are these claims against the business? Do they go back prior to the formation of the corporation?

A. I don't believe so. As far as I know, everything prior to the formation of the corporation is paid up. At least, that [37] is what Joe informed me lately. I don't know.

Q. Did you ever receive any money from the corporation?

A. Sorry; I never received a cent. I put it in. If you find any that I could receive after everybody else is paid, I will be glad to get it.

Q. When did you return from Tahiti?

A. I think it was about October 15.

Q. Was the Burlingame Products Company in operation then?

A. They told me it was in very bad shape and was closed. I think the Sheriff was down there at that time. I was so utterly disgusted, I never went near it when I came back.

Q. While you were away, did you receive letters from anyone about the operation of the business?

A. The only word I received was from the corporation counsel, stating he was trying to get a statement from the officers.

Q. Did you write to anyone about the operation of the business?

A. No, because by that time I knew I was re-

(Testimony of F. W. MacKay.)

turning from Tahiti. I found conditions dreadfully bad there, as they are in all foreign countries today. I can tell you, you think it is bad here, but it is a lot worse there. Anyhow, I wrote to no one, because I intended shortly to return to the United States.

Mr. Conners: If the Court please, no further examination of these three persons who were subpoenaed today. We would like the matter continued and each of them instructed to return unless they are notified to the contrary, and I suggest about three weeks. [38]

Mr. McLeod: I wonder, Mr. Moran, if you would mind making a statement that would clarify the issuance of the stock, or the arrangements made about the issuance of the stock, since they refer to you?

(Witness excused.)

Mr. Moran: At the time the corporation was formed, there was no financial set-up and the understanding was simply that when the values of the assets were ascertained, there would be stock in proportion to what their value was, together with some cash payments to be made by the three directors of the company, all subject to the approval of the Corporation Commissioner. I suppose, by reason of moving the plant, all that sort of thing, getting the business established and going, things were in considerable confusion and so I never had a financial statement which I considered would be satisfactory to the Corporation Commissioner. That

is the reason for the delay in filing the application to issue stock.

Mr. McLeod: Was he correct in his recollection of the amount of a figure around \$8,000.00 as representing Mr. MacKay's claim?

Mr. Moran: If so, that was my computation and estimate, according to his recollection of what he thought he had put in.

Mr. McLeod: About \$8,000.00 altogether. No permit was ever asked for?

Mr. Moran: No application.

The Referee: I will continue this to May 14th, at 2:00 [39] p.m., and the witnesses who were here today will return at that time.

(Continued to May 14, 1947, at 2:00 p.m.)

Wednesday, May 14, 1947, 2:00 P.M.

Appearances:

For the Trustee: Stanley M. McLeod, Esq.

For the Witness F. W. MacKay: Nathan Moran, Esq.

The Referee: Are you ready to proceed in the Burlingame Products Company?

Mr. McLeod: I thought Mr. Conners was going to be here. Until he comes, can I ask a few questions?

The Referee: Go ahead. Who do you want on the stand?

Mr. McLeod: Mr. MacKay.

F. W. MacKAY

having been sworn previously, recalled.

By Mr. McLeod:

Q. Mr. MacKay, I may be repeating some questions I asked you before, but in connection with the Western Products Company, at the time that their assets were transferred over to the Burlingame Products Company, I believe you testified that you were to receive shares of stock in the bankrupt corporation, that is, the Burlingame Products Company, representing the value of the machinery, equipment, stock in trade and so on?

A. That is what I understood, yes.

Q. Transferred from the Western Products to Burlingame Products? A. That is right.

Q. Am I correct in assuming then that you considered yourself the owner of the Western Products Company? [41]

A. Joe Mauborgne was the owner. I backed him up; I never got paid up.

Q. Did he give you a note or any other evidence?

A. No.

Q. It was entirely orally?

A. Entirely orally.

Q. How much did you advance to him to set him up in business in the Western Products Company?

A. I cannot tell now. The books of the Western Products Company should show that, how much I advanced from time to time. I should say, oh, I could not give you an exact statement, somewhere between \$4,000.00 or \$5,000.00, I presume, from time to time.

(Testimony of F. W. MacKay.)

Q. It was not a lump sum?

A. No, from time to time, and purchases.

Q. As he required it?

A. Originally I purchased the equipment he wanted to start in this cage business. Then from time to time I paid for additional machinery and when the company moved to Burlingame and before the Western Products was formed, or the Burlingame Products, I advanced money there for rent and for wiring the building and one thing and another. I don't know exactly what it was all used for now.

Q. Do you know the basis on which Mr. Mauborgne was to get his shares of stock? You were to get yours on the basis of the amount of money you advanced to him? A. Yes.

Q. Do you know how his proportion was figured?

A. No, I do not. He subscribed to some shares of stock. I don't know how many. I don't even know what the par value of the stock was, but I think it was \$500.00 worth that he subscribed [42] to. That stock, I suppose, was to come out of the profits or out of an investment, I don't know.

Q. Do you mean that he subscribed cash at the time the Burlingame Products Company was organized?

A. That I don't know. I can only tell what I did. All of those matters were handled by the counsel for the company, Mr. Moran.

Q. In connection—by the way, do you know whether the Western Products Company merely

(Testimony of F. W. MacKay.)

rented its place of business or did it have a lease?

A. I don't know whether it had a lease or not. It might have had a lease, or might have rented from month to month. Mr. Mauborgne could tell that. I know it was in his name, whatever the arrangements were.

Q. In connection with the lease of the Burlingame property, where the bankrupt conducted its business——

A. Yes.

Q. You entered in the lease?

A. Originally, it was made in my name with the provision that it should be turned over to a California Corporation as soon as that corporation was formed, in which I was to be a major stockholder. That was part of the lease.

Q. What were the circumstances under which you undertook to put your name on the lease?

A. Well, the necessity of that was a matter of establishing credit until such time as the corporation was formed. [43]

Q. In other words, it was considered that your name was better than Mr. Mauborgne's?

A. I don't know as to that. I only know they asked me to sign it and I did sign it at the time.

Q. Who asked you to sign?

A. The realty company in Burlingame.

Q. Did you pick out the location, interview the realty company?

A. Who?

Q. The realty company.

A. Mr. Mauborgne and I together. I went down with him.

(Testimony of F. W. MacKay.)

Q. Both together?

A. Yes, he was there.

Q. You signed individually?

A. With the right of transferring to the corporation, yes.

Q. Which was later done?

A. Which was done. Wait a minute. Can I ask you a question?

Q. Sure.

A. Was it later transferred to the corporation? I understood it was. That is correct, isn't it?

Mr. McLeod: It contained such a provision permitting Mr. MacKay to transfer?

Mr. Moran: The provision was in the original lease.

The Witness: The time I got this, the corporation was in process of being formed. That was my understanding.

Q. (By Mr. McLeod): Did you have to put up a deposit on the lease? A. Yes, I did.

Q. How much, do you recall?

A. I think I put up the first and last months' rent, as I remember. I could not say; the lease will tell that. [44]

Q. This may be something you are not familiar with, but at the time the Western Products Company became the Burlingame Products Company, I understood Mr. Mauborgne to say that the Western Products Company's account was closed out and if he had any moneys, they were transferred to the Burlingame Products Company.

(Testimony of F. W. MacKay.)

A. That is what I understood from testimony here. Personally, I could not say.

Q. Do you know whether, at that time, all of the liabilities of the Western Products Company were paid, or were they assumed by the Burlingame Products Company?

A. Well, no, I don't know as to that. I assume, if they assumed the assets, they must assume any liabilities. I would not know as to that. That would be a matter for the officers of the corporation.

Mr. McLeod: I think that is all I have, your Honor, of Mr. MacKay, reserving the right for Mr. Conners, if he does appear while this hearing is in session, to recall him.

(Witness excused.)

JOSEPH O. MAUBORGNE

having been previously sworn, recalled.

The Referee: You have been sworn already.

By Mr. McLeod:

Q. Mr. Mauborgne, when the Western Products Company ceased operations, I understood you to testify at the last hearing, that you closed out the bank account? A. That is correct.

Q. And was there any surplus?

A. There was the [45] original check we started with, \$800.00 or \$900.00, whatever the check was.

Q. That was redeposited to the account opened in the name of Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

A. That is correct.

Q. Did you, at that time, did you, prior to the opening of the Burlingame Products account, pay all the liabilities of the Western Products Company?

A. No, I did not.

Q. You paid the Western Products Company's liabilities, then, from the Burlingame Products Company's account?

A. That is correct.

Q. Was there, to your knowledge, any written agreement between Western Products Company and Burlingame Products Company as to the assumption of liabilities of the Western Products Company?

A. No, there was not, not that I know of.

Q. In other words, for all practical purposes, it was merely a change of name?

A. That is correct. Incidentally, I told you I paid the Pacific Gas and Electric Company's bills for the Western Products Company and they refunded that to me the other day.

Q. Did you pay that out of the checking account of Burlingame Products Company?

A. No, I paid that money. They came to me and said they would shut the lights off if I did not. I paid for that under my own name and they refunded that to me.

Q. That was while you were in business in Burlingame?

A. No, it was just refunded the other day.

Q. I say, it represented electricity furnished to Burlingame [46] Products Company?

(Testimony of Joseph O. Mauborgne.)

A. No, it represented electricity furnished to the Western Products Company.

Q. How much did it amount to?

A. \$15.13.

Q. And you paid the original bill from your own private, individual funds?

A. That is correct.

Q. Mr. Mauborgne, when it was decided to form the bankrupt corporation and issue stock, on what basis were the number of shares allotted to you?

A. I could not tell you anything about the shares.

Q. What?

A. I could not tell you anything about the shares.

Q. Do you know how many you were to get?

A. I don't know anything about that, no.

Q. Were you to put up any money?

A. That I don't know. I believe it was understood that each of us was to put up \$100.00, each, something like that, I could not tell you more than that.

Q. Why don't you know?

A. Well, I know nothing more about it than that. I was to take some shares after it got going, but how much it amounted to, that I could not tell you.

Q. Who told you you were to put up \$100.00?

A. I think it was agreed among us at that meeting.

Q. Between Mr. MacNeil, Mr. MacKay—

A. No, Mr. MacNeil, myself and whoever the Vice-President was.

(Testimony of Joseph O. Mauborgne.)

Q. Helms? A. Helms, that is right.

Q. Did you have a lease on the premises where you operated the [47] Western Products Company?

A. No.

Q. That was a month-to-month tenancy?

A. That is right. I got to thinking after you asked me the last time I was on the stand something about money to finance the Burlingame Products Company, if we received more in cash. We borrowed money while Mr. MacKay was away.

Q. Borrowed? A. Yes.

Q. From whom?

A. From Mr. Herber and Mr. Schofield.

Q. Were they repaid?

A. No, they were not.

Q. Are they creditors of the Burlingame Products Company? A. That is right.

Q. How much was this?

A. I don't know; some \$2,000.00, I believe.

Q. Mr. Schofield is the representative of the Burlingame Sales Company?

A. That is correct.

Q. That took your entire products?

A. Yes.

Q. Who is Mr. Herber?

A. Well, Mr. Herber, I believe is the owner of that.

Mr. McLeod: I see.

A. I don't know whether you would call that money put up for financing or money loaned us to go on with the business.

(Testimony of Joseph O. Mauborgne.)

Q. Did you give any notes?

A. Yes, we did. We paid off when we came there, \$100.00 every two weeks, something like that.

Q. Do you know whether those appear on the corporation's books? A. I am sure they do.

Q. Who kept the books, by the way?

A. Mr. MacNeil had the books at the book store.

Q. Of Burlingame Products Company. Who kept the books of Western Products Company?

A. I have those books.

The Referee: Mr. Herber has a claim on file here for \$523.92.

The Witness: That is one of them, your Honor.

Mr. McLeod: I think also, that Mr. Schofield has a \$2,000.00 claim, or something like that.

A. The original money borrowed, I believe, was only \$500.00. That comes to \$523.00 now.

The Referee: With interest.

A. With interest.

The Referee: Yes.

The Witness: How much was it originally, \$500.00?

The Referee: \$500.00 with six per cent interest.

A. I am sure something was paid on that. Does it say something was paid?

The Referee: It is dated June 28, 1946, and note due to date.

A. Maybe it is the other one. We made a few payments of \$100.00 a week on one of those two notes.

(Testimony of Joseph O. Mauborgne.)

Q. (By Mr. McLeod): Would your books show those payments?

A. I believe they would, yes. They were paid with checks.

Q. Mr. Mauborgne, when you set up business of the Western Products Company, Mr. MacNeil advanced you cash, did he? [49]

A. Mr. MacKay.

Q. Mr. MacKay, I beg your pardon.

A. That is correct.

Q. And then, did you go out and purchase the necessary equipment? A. I did, yes, I did.

Q. You did all the purchasing?

A. That is right. We bought the majority of the stuff from one man and bought it as a unit.

Q. You paid cash for it?

A. That is correct, \$1153.00, I believe.

Q. How much? A. \$1,153.00.

Mr. McLeod: As far as I am concerned, your Honor, I am ready to conclude this examination. Evidently, Mr. Connors is not going to be present and, therefore, it may go off calendar now.

Mr. Moran: And the witness *are* excused?

The Referee: Yes.

Mr. MacKay: May I ask a question? Mr. Mauborgne may be able to answer a question you asked me.

Q. (By Mr. MacKay): Did you consider when the Burlingame Products Company took over the assets of the Western Products Company that it also assumed the liabilities?

(Testimony of Joseph O. Mauborgne.)

A. Without doubt, I would say so. We paid the bills that we got at that time.

Q. (By Mr. McLeod): Was there any written agreement?

A. No written agreement, just agreed between Mr. MacNeil and myself that as the bills came in we would pay if the money [50] was there to pay. Of course, we only had a small amount, \$800.00 to start with. We were short when we started out.

Q. Whose idea was it to incorporate?

A. I think we just talked it over among ourselves, Mr. MacNeil, Mr. MacKay and myself.

Mr. MacKay: If I was going to put additional funds in, I wanted additional protection.

Mr. Moran: I might add to my statement regarding the lease, that there was a provision to get an assignment and a release for Mr. MacKay.

The Referee: Thank you. That is all.

(Witness excused.)

(Concluded.) [51]

Monday, September 8, 1947—2 P.M.

ORDER TO SHOW CAUSE vs. F. W. MacKAY

Mr. Moran: Appearing on behalf of the respondent, F. W. MacKay, there is an objection in the nature of a general demurrer, that the petition does not state facts, or grounds justifying the relief sought.

Also, the affidavit of the respondent alleges:

“That he is an American citizen, of the age of

53 years or thereabouts, and by profession a geologist and mining operator. That approximately sixteen years ago he retired from professional and general business activities and since that time has devoted himself to travel and the pursuit of outdoor recreation.

“That affiant has no dependents nor any living near relatives. That he has from sources outside the State of California an income sufficient to supply his wants and that he has no motive nor incentive, nor any desire nor inclination to amass properties, to increase his income, nor to re-enter business activities of any kind, but that from time to time he has become acquainted with worthy individuals who were struggling to advance themselves under difficulties and has advanced them financial aid but with no motive of profit to himself except to recover the amount of such advances and possibly interest thereon at current commercial rates.

“That during the war period affiant became acquainted in San Francisco with one Joseph O. Mauborgne, Jr., through a common interest in breeds of dogs, and [2*] formed for him liking and regard; that said Mauborgne is in the business of running a pet shop and had knowledge of a small bird-cage manufacturing business operated by an individual who wanted to retire, and that he, Mauborgne, wished to acquire and operate the same as a side line to his store, more especially as there was a war shortage of the product, and to him

*Page numbering appearing at foot of page of original certified Transcript of Record.

affiant advanced the money required to purchase the machinery and equipment used in said business. Said transaction was made under an agreement between affiant and said Mauborgne that the latter should devote all necessary time in mechanical and managerial services to the operation of the said business, without salary or compensation other than that the profits thereof would be divided share and share alike between himself and affiant. That said purchase was made, and Mauborgne took over the equipment and operation of the said business accordingly, and continued the same in the said City of San Francisco under the trade name of Western Products Company. That bird-cages were and are important to said Mauborgne but of no interest or consequence to affiant.

“That during the early part of the year 1946 affiant decided to return for an indefinite period to the Island of Tahiti in the South Pacific, where he had resided and had interests previously to his coming by reason of the war to San Francisco, and he thereupon [3] consulted an attorney with respect to his local business affairs, and was by the latter advised that the business last referred to did not have proper legal standing inasmuch as the fictitious name thereof had never been registered as required by law.

“That upon consultation between affiant and said Mauborgne it was mutually agreed that they would form a corporation to take over and operate the said business, on the basis that the profits and emoluments thereof or whatever the same might

consist would be divided share and share alike between the two, and in pursuance of said agreement a corporation was formed, under the name Burlingame Products Company, which took over the assets and operation of the preceding business, and inasmuch as its facilities in San Francisco were inadequate moved the same to the City of Burlingame, County of San Mateo, California, in the course of which affiant made further cash advances to the said corporation, of which Mauborgne had become president and manager and who thereafter gave to it his full time and services and the use of his automobile without salary or compensation other than his agreed perspective one-half share in the profits and any issue of corporate stock which might result. That the said Mauborgne also from time to time made contributions in cash for the benefit of the said corporation, the amount of which affiant does not [4] at present recollect.

“That affiant did not become a director or officer of the said corporation, and shortly after its formation departed for the Island of Tahiti, where he remained until in or about the month of September, 1946, when he returned to San Francisco and found that the said corporation was in a state of insolvency.

“That at the first meeting of the board of directors of said corporation its attorney was requested and instructed to make application to the Corporation Commissioner of the State of California for the issuance of corporate stock, in such amounts as in his opinion were justified by the financial con-

dition of the company; that affiant is informed by said attorney and believes and therefore alleges that in the interim last mentioned no application was filed with the said Corporation Commissioner for the issuance of stock, for the reason that the removal of the corporate business from San Francisco and its re-establishment in Burlingame involved numerous complications and distractions on the part of the company's officers and that the financial and other statements required by law and regulations for a proper application to the Corporation Commissioner could not be obtained.

“That in addition to the instance hereinabove cited, on three other occasions this affiant has made financial advances to individuals whom he considered personally worthy, in order that they might individually better their condition in the community, on an agreed basis of sharing its profits and emoluments, two of which were in the ratio of equal shares and the other at a somewhat different percentage.”

And the rest consists of general and specific denials of the allegations of the petition.

The Referee: Mr. McLeod?

Mr. McLeod: If your Honor please, you will probably recall the testimony given by the various officers of Burlingame Products Company, including Mr. Mauborgne, the president and Mr. MacNeil, the secretary-treasurer. It was testified at that time that the corporation had been formed at the instigation of Mr. MacKay; that no shares of stock had been issued, and according to notes I made, the only financial investment Mauborgne had ever made in

Burlingame Products Company or the predecessor co-partnership was about \$400.00. Mr. MacKay took the lease on the place of business of the bankrupt, paid the first and last months' rent, and sometime thereafter, or after the organization of the corporation, assigned the lease to it. Neither Mauborgne nor MacNeil appeared to know just what their reward in the form of shares of stock were to be. They also, at least, Mr. MacNeil who was the secretary-treasurer pleaded almost complete ignorance about the business of the corporation, I think. Correct me, Counsel, if I exceed my recollection. [6]

Also, as I recall it, he testified he was approached by Mr. MacKay and put in the office of secretary-treasurer, presumably to watch over Mr. MacKay's interests.

The basis of this Order To Show Cause and Petition is that actually there was no corporation; that it was formed at the behest of Mr. MacKay because of his contemplated absence from the country; it was his own baby, as it were, and no shares of stock ever were issued; the corporation, actually, did not come to a fruition, as it were, and it is the contention of the Trustee that it was under the domination of Mr. MacKay; that it was his sole activity; he was the sole motivating power behind it; and your Honor has obtained summary jurisdiction over Mr. MacKay by his appearance here.

For that reason, the Trustee makes this motion for marshalling his assets to make up the difference between the assets of the estate and the amounts of the claims that have been presented in this proceeding.

The Referee: What about the objection that the Petition does not state facts or grounds to support any of the allegations?

Mr. Moran: Because the Petition is based purely upon conjectures, your Honor.

Mr. McLeod: No, I don't concede to Counsel that it is based on conjecture. It is based on the testimony of the various interested parties in this matter and also it is based upon the law, that a corporation, not having actually become active. the parties, the promoters of the corporation, actually [7] are joint-venturers.

Mr. Moran: The corporation, of course, your Honor, was duly and legally organized and that came into existence when the Secretary of State issued his Certificate to that effect. It began to function, took over an assignment of the lease, and operated a manufacturing business in its own name. The arrangement, of course, is nothing at all unusual, that one man will contribute services to an undertaking and another man will finance it, and that is exactly the case here. It was not intended that Mauborgne put up any money; however, he did, but he agreed he would give his time and Mr. MacKay advanced the money, not through any motives of personal benefit, but, as testified here, through his liking and confidence in Mauborgne and simply wanting to help him along. It is not a case where it is the matter of a one-man corporation but is strictly a matter of equities, where one man owns and is in position to claim the entire assets. The matter of the issuance of stock, whether the

stock would be in his name or anybody else's name, it would be a question of equity as to whether a single man would be able to claim and take over all the assets of the corporation. Advisedly, I say that could not be done here, under the agreement that MacKay advanced the necessary moneys and Mauborgne give his services. It was strictly a matter of salary and looking to the future compensation in profits and stock of the corporation.

Mr. McLeod: On the point of equity, your Honor, I cite [8] the case of Pepper vs. Litton, 60 Sup. Ct. 238, decided by the United States Supreme Court in 1939. The citation is 60 Sup. Ct. 238.

The Referee: I am familiar with the case.

Mr. McLeod: Are you familiar with the case?

The Referee: Yes.

Mr. McLeod: All I was going to state was, that in that decision it states that equity has disregarded at times the corporate entity, especially in an instance where it has been shown that a corporation is a stockholder's own enterprise, and in that case the Court says it will treat the corporation simply as part of the stockholder's property and consistently with the course of conduct of the stockholder. In this instance, I think, that the testimony that was developed at the two examinations held of the officers of the corporation distinctly shows that they were purely dummys, as it were, for Mr. MacKay.

Mr. Moran: What is that citation, please?

Mr. McLeod: Pepper vs. Litton, 60 Sup. Ct. 238.

The Referee: Really, what you are contending,

Mr. McLeod, is that the corporation was the alter-ego of Mr. MacKay.

Mr. McLeod: That is true. That is what we are endeavoring to contend.

The Referee: Do you think your pleading is sufficient to show that? You have an allegation in the second paragraph to the effect that said F. W. MacKay and said corporation were and are, in reality, the same. That is an allegation of fact. I think the next sentence is really a conclusion of law, it is argumentative.

Mr. McLeod: That is a conclusion. I concede that. It is based upon the facts but that is a conclusion.

The Referee: Yes. I think the objection that the Petition for said Order To Show Cause does not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, should be overruled and such is the ruling.

Now, I presume, in the absence of Mr. MacKay, we will have to set down a date for the hearing.

Mr. McLeod: Yes.

The Referee: What date can Mr. MacKay be here, Counsel?

Mr. Moran: I think almost any time. I assumed, your Honor, that on a written Petition for Order To Show Cause, the proper response was a written answer to the Petition and the appearance by Counsel, and that an oral examination would not be necessary, particularly as the respondent has been fully examined.

The Referee: Are you willing to stipulate that the matter may be considered on the testimony heretofore given?

Mr. McLeod: I think the Trustee is, your Honor, because I don't believe we would develop anything further from Mr. MacKay's examination.

The Referee: Are you?

Mr. Moran: Yes, your Honor. [10]

The Referee: Very well, then. The matter may be submitted. If Counsel has any law, either one of you, that you want to give to the Court, other than what Mr. McLeod has already given me, I would be glad to hear from you.

Mr. Moran: I would like to examine this case, your Honor, and I would like five days to file points and authorities.

The Referee: Five, five and three.

Mr. Moran: Yes.

Mr. McLeod: That is agreeable.

(Submitted 5/5/3.) [11]

[Endorsed]: No. 11937. United States Circuit Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of Burlingame Products Co., Inc., Bankrupt, Appellant, vs. F. W. MacKay, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.